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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: Texas Service Center Date: AUG 22 2003

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The decision of the AAO will be withdrawn, and the petition will be approved.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds into a new commercial enterprise. On appeal, the petitioner, through counsel, submitted documentation addressing many of the director's concerns. On November 13, 2002, the AAO dismissed the appeal. The AAO concluded that the documentation on appeal overcame the director's concerns regarding the petitioner's investment in a new commercial enterprise,[1] but concluded that the petitioner had not adequately demonstrated the lawful source of his funds.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, Com Com Systems, Inc., not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000. As discussed in our previous decision, the petitioner has demonstrated an investment of over $1,000,000 into Com Com Systems.

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[1] The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. Thus, the AAO's discussion of that issue in its previous decision was in error.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted no evidence regarding the source of the invested funds. In response to the director's notice of intent to deny, the petitioner submitted a letter from Frank Penski of Nixon Peabody, LLP, who handled the petitioner's civil lawsuit. Mr. Penski asserts that the petitioner was awarded $3,510,584.20 in a complex civil lawsuit. The petitioner also submitted a summary of the transactions in his trust account managed by Mr. Penski.

The director concluded that the petitioner had not submitted sufficient evidence of the outcome of his civil suit. On appeal, the petitioner submitted the actual stipulation of settlement and the judge's order enforcing the settlement. The AAO concluded that the documentation did not entirely resolve this issue. The order reveals that the petitioner was the defendant in the suit,

with Citibank as the garnishee. The record did not resolve the nature of the underlying transaction. Specifically, the AAO concluded that the petitioner had not demonstrated whether the award constituted new funds never previously available to the petitioner or whether it involved the release of the petitioner's previously owned funds garnished by the plaintiff at the onset of litigation. The AAO explained that such information is relevant because if the $3,510,584.20 was merely returned to the petitioner upon settlement, that fact begs the question of where the petitioner obtained the money in first place. The AAO noted the lack of personal tax returns that might explain how the petitioner accumulated over $3,000,000 prior to the instigation of the lawsuit. The AAO advised that any motion attempting to resolve this issue would need to include additional information on the litigation and credible evidence of the petitioner's income, such as personal tax returns, prior to 1991. In a footnote, the AAO suggested that arguments regarding the lack of availability of such evidence would not be persuasive.

On motion, counsel acknowledges that the funds were released, not awarded, upon conclusion of the lawsuit. Counsel explains that the lawsuit arose out of management issues at [redacted] that occurred after the petitioner sold his shares and retired as CEO of that company. As evidence of the petitioner's income prior to retiring as CEO of [redacted] the petitioner submitted his income tax returns for 1978 through 1982. These returns are stamped by the German government and accompanied by certified translations and exchange rates. They reveal that the petitioner earned a total of $12,567,802 during those years. This income is sufficient to account for the more than $4,000,000 the petitioner began investing with Citibank, N.A. in 1981. This investment constitutes the funds garnished in 1984 and released in 1994 upon resolution of the lawsuit.

The evidence submitted both on appeal and on motion has been consistent, clearly presented, and responsive to the legitimate concerns of the Service (now the Bureau). At this time, the record satisfactorily reflects that the petitioner, previously a successful businessman in Germany, invested over $1,000,000 of lawfully obtained funds into a commercial enterprise and through that investment has created more than 10 jobs.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The decision of November 13, 2002, is withdrawn, and the petition is approved.